

HOUSE No. 1701

The Commonwealth of Massachusetts

PRESENTED BY:

Lori A. Ehrlich

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to the judicial enforcement of noncompetition agreements.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Lori A. Ehrlich</i>	<i>8th Essex</i>
<i>William N. Brownsberger</i>	<i>Second Suffolk and Middlesex</i>
<i>David M. Rogers</i>	<i>24th Middlesex</i>
<i>Jay D. Livingstone</i>	<i>8th Suffolk</i>
<i>Jennifer E. Benson</i>	<i>37th Middlesex</i>
<i>Kenneth I. Gordon</i>	<i>21st Middlesex</i>
<i>Tricia Farley-Bouvier</i>	<i>3rd Berkshire</i>
<i>Jason M. Lewis</i>	<i>Fifth Middlesex</i>
<i>James R. Miceli</i>	<i>19th Middlesex</i>
<i>Colleen M. Garry</i>	<i>36th Middlesex</i>
<i>Dennis A. Rosa</i>	<i>4th Worcester</i>
<i>Cory Atkins</i>	<i>14th Middlesex</i>
<i>Marjorie C. Decker</i>	<i>25th Middlesex</i>
<i>Ruth B. Balsler</i>	<i>12th Middlesex</i>
<i>James M. Cantwell</i>	<i>4th Plymouth</i>
<i>Alice Hanlon Peisch</i>	<i>14th Norfolk</i>

<i>Tom Sannicandro</i>	<i>7th Middlesex</i>
<i>Daniel A. Wolf</i>	<i>Cape and Islands</i>
<i>Patricia D. Jehlen</i>	<i>Second Middlesex</i>
<i>Kay Khan</i>	<i>11th Middlesex</i>
<i>Edward F. Coppinger</i>	<i>10th Suffolk</i>
<i>Louis L. Kafka</i>	<i>8th Norfolk</i>
<i>Carlos Gonzalez</i>	<i>10th Hampden</i>
<i>James B. Eldridge</i>	<i>Middlesex and Worcester</i>
<i>Chris Walsh</i>	<i>6th Middlesex</i>
<i>Diana DiZoglio</i>	<i>14th Essex</i>
<i>Elizabeth A. Malia</i>	<i>11th Suffolk</i>
<i>Sean Garballey</i>	<i>23rd Middlesex</i>

HOUSE No. 1701

By Ms. Ehrlich of Marblehead, a petition (accompanied by bill, House, No. 1701) of Lori A. Ehrlich and others for legislation to limit the time that former employees must wait before being employed by a competitor. Labor and Workforce Development.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 1715 OF 2013-2014.]

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act relative to the judicial enforcement of noncompetition agreements.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Sections 42 and 42A of chapter 93 of the General Laws are hereby
2 repealed.

3 SECTION 2. The General Laws are hereby amended by inserting after chapter 93K the
4 following chapter:--

CHAPTER 93L

UNIFORM TRADE SECRETS ACT

5
6

7 Section 1. As used in this chapter the following words, shall unless the context clearly
8 requires otherwise, have the following meanings:

9 (1) "Improper means", includes, without limitation, theft, bribery, misrepresentation,
10 unreasonable intrusion into private physical or electronic space, or breach or inducement
11 of a breach of a confidential relationship or other duty to limit acquisition, disclosure or
12 use of information; reverse engineering from properly accessed materials or information
13 is not improper means;

14 (2) "Misappropriation",

15 (i) an act of acquisition of a trade secret of another by a person who knows or who
16 has reason to know that the trade secret was acquired by improper means; or

17 (ii) an act of disclosure or of use of a trade secret of another without that person's
18 express or implied consent by a person who

19 (A) used improper means to acquire knowledge of the trade secret or

20 (B) at the time of the actor's disclosure or use, knew or had reason to
21 know that the actor's knowledge of the trade secret was

22 [I] derived from or through a person who had utilized improper
23 means to acquire it;

24 [II] acquired under circumstances giving rise to a duty to limit its
25 acquisition, disclosure, or use; or

26 [III] derived from or through a person who owed a duty to the
27 person seeking relief to limit its acquisition, disclosure, or use; or

28 (C) before a material change of the actor's position, knew or had reason to
29 know that it was a trade secret and that the actor's knowledge of it had

30 been acquired by accident, mistake, or through another person's act in
31 violation of subsections 1(2)(i) or 1(2)(ii)(A) or –(B).

32 (3) "Person", a natural person, corporation, business trust, estate, trust, partnership,
33 association, joint venture, government, governmental subdivision or agency, or any other
34 legal or commercial entity.

35 (4) "Trade secret", specified or specifiable information, whether or not fixed in tangible
36 form or embodied in any tangible thing, including but not limited to a formula, pattern,
37 compilation, program, device, method, technique, process, business strategy, customer
38 list, invention, or scientific, technical, financial or customer data that

39 [i] at the time of the alleged misappropriation, provided economic advantage,
40 actual or potential, from not being generally known to, and not being readily
41 ascertainable by proper means by, others who might obtain economic advantage
42 from its acquisition, disclosure or use; and

43 [ii] at the time of the alleged misappropriation was the subject of efforts that were
44 reasonable under the circumstances, which may include reasonable notice, to
45 protect against it being acquired, disclosed or used without the consent of the
46 person properly asserting rights therein or such person's predecessor in interest.

47
48 Section 2. (a) Actual or threatened misappropriation may be enjoined upon principles of
49 equity, including but not limited to consideration of prior party conduct and circumstances of
50 potential use, upon a showing that information qualifying as a trade secret has been or is
51 threatened to be misappropriated. Upon application to the court, an injunction shall be
52 terminated when the trade secret has ceased to exist, but the injunction may be continued for an

53 additional reasonable period of time in order to eliminate any economic advantage that otherwise
54 would be derived from misappropriation.

55 (b) In exceptional circumstances, an injunction may condition future use upon payment
56 of a reasonable royalty for no longer than the period of time for which use could have been
57 prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial
58 change of position prior to acquiring knowledge or reason to know of misappropriation that
59 renders a prohibitive injunction inequitable.

60 (c) In appropriate circumstances, affirmative acts to protect a trade secret may be
61 compelled by court order.

62

63 Section 3. (a) Except to the extent that a material and prejudicial change of position prior
64 to acquiring knowledge or reason to know of misappropriation renders a monetary recovery
65 inequitable, a complainant is entitled to recover damages for misappropriation of information
66 qualifying as a trade secret. Damages can include both the actual loss caused by
67 misappropriation and the unjust enrichment caused by misappropriation that is not taken into
68 account in computing actual loss. In lieu of damages measured by any other methods, the
69 damages caused by misappropriation may be measured by the imposition of liability for a
70 reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

71 (b) If willful and malicious misappropriation exists, the court may award exemplary
72 damages in an amount not exceeding twice any award made under subsection (a).

73

74 Section 4. The court may award reasonable attorney's fees and costs to the prevailing
75 party if: (i) a claim of misappropriation is made or defended in bad faith, (ii) a motion to enter or

76 to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious
77 misappropriation exists. In considering such an award, the court may take into account the
78 claimant's specification of trade secrets and the proof that such alleged trade secrets were
79 misappropriated.

80

81 Section 5. (a) In an action under this chapter, a court shall preserve the secrecy of an
82 alleged trade secret by reasonable means, which may include granting protective orders in
83 connection with discovery proceedings, holding in-camera hearings, sealing the records of the
84 action, and ordering any person involved in the litigation not to disclose an alleged trade secret
85 without prior court approval.

86 (b) In an action under this chapter, in alleging trade secrets misappropriation a party must
87 state with reasonable particularity the circumstances thereof, including the nature of the trade
88 secrets and the basis for their protection. Before commencing discovery relating to an alleged
89 trade secret, the party alleging misappropriation shall identify the trade secret with sufficient
90 particularity under the circumstances of the case to allow the court to determine the appropriate
91 parameters of discovery and to enable reasonably other parties to prepare their defense.

92

93 Section 6. An action for misappropriation must be brought within 3 years after the
94 misappropriation is discovered or by the exercise of reasonable diligence should have been
95 discovered. For the purposes of this chapter, a continuing disclosure or use constitutes a single
96 claim.

97

98 Section 7. (a) Except as provided in subsection (b), this chapter shall supersede any
99 conflicting laws of the Commonwealth providing civil remedies for the misappropriation of a
100 trade secret.

101 (b) This chapter does not affect:

102 (1) contractual remedies, provided that, to the extent such remedies are based on an
103 interest in the economic advantage of information claimed to be confidential, such
104 confidentiality shall be determined according to the definition of trade secret in
105 subsection 1(4), where the terms and circumstances of the underlying contract shall be
106 considered in such determination;

107 (2) remedies based on submissions to governmental units;

108 (3) other civil remedies to the extent that they are not based upon misappropriation of a
109 trade secret; or

110 (4) criminal remedies, whether or not based upon misappropriation of a trade secret.

111
112 Section 8. This chapter shall be applied and construed to effectuate its general purpose to
113 make uniform the law with respect to the subject of this chapter among States enacting it.

114 Section 9. This chapter shall be known and may be cited as the Uniform Trade Secrets Act.

115
116 SECTION 3. Chapter 149 of the General Laws, as appearing in the 2014 Official Edition,
117 is hereby amended by inserting after section 24K the following section:-

118
119 **Section 24L. Massachusetts Noncompetition Agreement Act**

120

121 (a) As used in this section, the following words shall have the following meanings:

122

123 “Business entity”: any person or group of persons performing or engaging in any activity,
124 enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for
125 profit or not for profit, including but not limited to corporations, limited liability companies,
126 limited partnerships, or limited liability partnerships.

127

128 “Employee”: an individual who is considered an employee under section 148B of this
129 chapter; provided, however, that the term “employee”, as used in this chapter, shall also include
130 independent contractors under section 148B.

131

132 “Forfeiture agreement”: an agreement that imposes adverse financial consequences on a
133 former employee as a result of the termination of an employment relationship, regardless of
134 whether the employee engages in competitive activities following cessation of the employment
135 relationship. Forfeiture agreements do not include forfeiture for competition agreements.

136

137 “Forfeiture for competition agreement”: an agreement that by its terms or through the
138 manner in which it is enforced imposes adverse financial consequences on a former employee as
139 a result of the termination of an employment relationship if the employee engages in competitive
140 activities.

141

142 “Garden leave clause”: a provision within a noncompetition agreement by which an
143 employer agrees to pay the employee during the restricted period.

144

145 “Noncompetition agreement”: an agreement between an employer and an employee, or
146 otherwise arising out of an existing or anticipated employment relationship, under which the
147 employee or expected employee agrees that he or she will not engage in certain specified
148 activities competitive with his or her employer after the employment relationship has ended.
149 Noncompetition agreements include forfeiture for competition agreements, but do not include (i)
150 covenants not to solicit or hire employees of the employer; (ii) covenants not to solicit or transact
151 business with customers, clients, or vendors of the employer; (iii) noncompetition agreements
152 made in connection with the sale of a business entity or substantially all of the operating assets of
153 a business entity or partnership, or otherwise disposing of the ownership interest of a business
154 entity or partnership (or division or subsidiary thereof), when the party restricted by the
155 noncompetition agreement is a significant owner of, or member or partner in, the business entity
156 who will receive significant consideration or benefit from the sale or disposal; (iv)
157 noncompetition agreements outside of an employment relationship; (v) forfeiture agreements;
158 (vi) nondisclosure or confidentiality agreements; (vii) invention assignment agreements; (viii)
159 garden leave clauses; (ix) noncompetition agreements made in connection with the cessation of
160 or separation from employment if the employee is expressly given seven business days to rescind
161 acceptance; or (x) agreements by which an employee agrees to not reapply for employment to
162 the same employer after termination of the employee.

163

164 “Restricted period”: the period of time after the date of cessation of employment during
165 which an employee is restricted by a noncompetition agreement from engaging in activities
166 competitive with his or her employer.

167

168 (b) To be valid and enforceable, a noncompetition agreement must meet the minimum
169 requirements of subsections (i) through (viii) hereof.

170

171 (i) If the agreement is entered into in connection with the commencement of employment,
172 it must be in writing and signed by both the employer and employee and expressly state that the
173 employee has the right to consult with counsel prior to signing. The agreement must be provided
174 to the employee by the earlier of a formal offer of employment or 10 business days before the
175 commencement of the employee's employment.

176

177 (ii) If the agreement is entered into after commencement of employment but not in
178 connection with the separation from employment, it must be supported by fair and reasonable
179 consideration independent from the continuation of employment, and notice of the agreement
180 must be provided at least 10 business days before the agreement is to be effective. Moreover, the
181 agreement must be in writing and signed by both the employer and employee and expressly state
182 that the employee has the right to consult with counsel prior to signing.

183

184 (iii) The agreement must be no broader than necessary to protect one or more of the
185 following legitimate business interests of the employer: (A) the employer's trade secrets, as that
186 term is defined in section 1 of chapter 93L; (B) the employer's confidential information that
187 otherwise would not qualify as a trade secret; or (C) the employer's goodwill. A noncompetition
188 agreement may be presumed necessary where the legitimate business interest cannot be

189 adequately protected through an alternative restrictive covenant, including but not limited to a
190 non-solicitation agreement or a non-disclosure or confidentiality agreement.

191

192 (iv) In no event may the stated restricted period exceed 12 months from the date of
193 cessation of employment, unless the employee has breached his or her fiduciary duty to the
194 employer or the employee has unlawfully taken, physically or electronically, property belonging
195 to the employer, in which case the duration may not exceed 2 years from the date of cessation of
196 employment.

197

198 (v) The agreement must be reasonable in geographic reach in relation to the interests
199 protected. A geographic reach that is limited to only the geographic areas in which the employee,
200 during any time within the last 2 years of employment, provided services or had a material
201 presence or influence is presumptively reasonable.

202

203 (vi) The agreement must be reasonable in the scope of proscribed activities in relation to
204 the interests protected. A restriction on activities that protects a legitimate business interest and
205 is limited to only the specific types of services provided by the employee at any time during the
206 last 2 years of employment is presumptively reasonable.

207

208 (vii) The noncompetition agreement shall be supported by a garden leave clause. To
209 constitute a garden leave clause within the meaning of this section, the agreement must (i)
210 provide for the payment, consistent with the requirements for the payment of wages under
211 section 148 of chapter 149 of the general laws, on a pro-rata basis during the entirety of the

212 restricted period, of at least 50 percent of the employee's highest annualized base salary paid by
213 the employer within the 2 years preceding the employee's termination; and (ii) except in the
214 event of a breach by the employee, not permit an employer to unilaterally discontinue or
215 otherwise fail or refuse to make the payments; provided, however, if the restricted period has
216 been increased beyond 12 months as a result of the employee's breach of a fiduciary duty to the
217 employer or the employee has unlawfully taken, physically or electronically, property belonging
218 to the employer, the employer shall not be required to provide payments to the employee during
219 the extension of the restricted period.

220

221 (viii) The agreement must be consonant with public policy.

222

223 (c) A noncompetition agreement shall not be enforceable against the following types of
224 workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29
225 U.S.C. 201-219; (ii) undergraduate or graduate students that partake in an internship or otherwise
226 enter a short-term employment relationship with an employer, whether paid or unpaid, while
227 enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii)
228 employees that have been terminated without cause or laid off; or (iv) employees age 18 or
229 younger. This section does not render void or unenforceable the remainder of the contract or
230 agreement containing the unenforceable noncompetition agreement, nor does it preclude the
231 imposition of a noncompetition restriction by a court, whether through preliminary or permanent
232 injunctive relief or otherwise, as a remedy for a breach of another agreement or a statutory or
233 common law duty.

234

235 (d) No court may, in its discretion, reform or otherwise revise a noncompetition
236 agreement so as to render it valid and enforceable to the extent necessary to protect the
237 applicable legitimate business interests.

238

239 (e) No choice of law provision that would have the effect of avoiding the requirements of
240 this section will be enforceable if the employee is, and has been for at least 30 days immediately
241 preceding his or her cessation of employment, a resident of or employed in Massachusetts at the
242 time of his or her termination of employment.

243

244 (f) All civil actions relating to employee noncompetition agreements or subject to this
245 section shall be brought in the county where the employee resides or in Suffolk County. The
246 superior court or the business litigation session of the superior court in Suffolk County shall have
247 exclusive jurisdiction of all civil actions relating to employee noncompetition agreements or
248 subject to this section.

249

250 SECTION 4. Section 3 may be referred to as the Massachusetts Noncompetition
251 Agreement Act and shall apply to employee noncompetition agreements entered into on or after
252 July 1, 2016.

253

254 SECTION 5. Section 2 of this Act shall take effect on July 1, 2016, and shall not apply
255 to misappropriation occurring prior to the effective date. With respect to a continuing
256 misappropriation that began prior to the effective date, the Act also does not apply to the
257 continuing misappropriation that occurs after the effective date.